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In the Supreme Court of Ohio.

JOHN G. KERWHAKER *vs.* THE CLEVELAND, COLUMBUS, AND CINCINNATI RAILROAD COMPANY.[1]

I. There is no law in Ohio prohibiting the owners of domestic animals, consisting of cattle, horses, hogs, &c., from permitting such animals to run at large upon the range of unenclosed lands, except when unruly and dangerous; and the rule of the common law of England, requiring the owner of such animals to keep them on his own land, or within enclosures, has never been in force in Ohio, being inapplicable to the circumstances, condition and usages of the people, and also inconsistent with the legislation of the State.

II. The owner of such animals, in allowing them to be at large on the range of unenclosed lands, is not chargeable with *an unlawful act*, or an omission of *ordinary care* in keeping his stock, doing nothing more than that which has been customary, and by common consent, done by the people generally since the first settlement of the State, subject to the qualification, however, that animals which are unruly or dangerous, are required to be restrained.

III. There is no law in this State requiring any person to fence or enclose his own lands; yet the person who leaves his grounds unenclosed, takes the risk of occasional intrusions thereon, by the animals of others running at large. And the owner of such animals, in allowing them to be at large, takes the risk of their loss, or of injury to them by unavoidable accident, from any danger into which they may happen to wander.

IV. The right of a railroad company to the free, exclusive and unmolested use of its railroad track, is nothing more than the right of every land proprietor, in the actual use and occupancy of his lands; and does not exempt the Company from the duty enjoined by law upon every person, so to use his own property as not to do any unnecessary injury to another.

V. There is no law in Ohio requiring railroad companies to fence their roads, but when they leave their railroads open and unenclosed by sufficient fences and cattle-guards, they take the risk of intrusions upon their roads by animals running at large, as do other proprietors, who leave their lands unenclosed; so that the owner of domestic animals, in allowing them to be at large, takes the risk of their loss, or of injury to them by unavoidable accident; and the company by leaving its road unprotected by an enclosure, runs the risk of animals at large getting upon the road, without any remedy against the owner of the animals.

VI. The liability to make reparation for an injury by negligence, is founded upon an original moral duty enjoined upon every person, so to conduct himself, or exercise his own rights, as not to injure another.

[1] This recent decision on the right to reparation in damages for injuries to domestic animals by Railroad Companies in Ohio, is published at the request of a number of members of the Western bar.—*Eds. Am. L. Reg.*

VII. The mere fact that one person is in the wrong, does not necessarily discharge another from the due observance of proper care towards him, or the duty of so exercising his own rights, as not to do him any unnecessary injury.

VIII. The doctrine that, in the case of an injury by negligence, where the parties are mutually in fault, the injured party is not entitled to redress, is subject to the following material qualifications, as appears from a review of the decisions both in England and in this country, on the subject, to wit:

1. The injured party, although in the fault to some extent—at the time, may notwithstanding this, be entitled to reparation in damages for an injury, which he used ordinary care to avoid.
2. When the negligence of the defendant in a suit upon such ground of action, is the *proximate* cause of the injury, but that of the plaintiff only *remote*, consisting of some act or omission, not occuring at the time of the injury, the action is maintainable.
3. Where a party has in his custody or control, dangerous instruments, or means of injury, and negligently places or leaves them in a situation unsafe to others, and another person, although at the time even in the commission of a trespass, or otherwise somewhat in the wrong, sustains an injury thereby, he may be entitled to redress.
4. And when the plaintiff in the *ordinary exercise of his own rights*, allows his property to be in an exposed and hazardous position, and it becomes injured by the neglect of ordinary care on the part of the defendant; he is entitled to reparation on the ground that, although, in allowing his property to be exposed to danger, he took upon himself the risk of loss or injury by *mere accident*, he did not thereby discharge the defendant from the duty of observing *ordinary care*, or in other words, voluntarily incur the risk of injury by the defendant's *negligence*.

IX. Having left its railroad unenlosed through a country where domestic animals are allowed to be at large, and thus exposed to the casualties of the animals accidentally getting upon the railway track, it is the duty of the railroad company, acting through its agents, to use *at least ordinary and reasonable care and diligence* to avoid unnecessary injury to the animals, when found in the way of a train on the road.

X. The first and paramount object of the attention of the agents of the company, is due regard for the safety of the persons and property in their charge on the train, for which they are held to a high degree of care, and so far as consistent with this paramount duty, they are bound to the exercise of what in that peculiar business would be *ordinary and reasonable care* to avoid unnecessary injury to animals casually coming upon their unenclosed road; and *for any injury to animals arising from a neglect of such care, the company is liable in damages to the owner.*

Writ of Error to the Court of Common Pleas of Morrow County.

In the Court below, the plaintiff in error declared against the defendant, in trespass on the case, for the alledged negligence and

misconduct of the defendant's agents in conducting and running a locomotive and cars on the defendant's railway track, whereby six hogs, the property of the plaintiff, were killed. The defendant pleaded the general issue.

On the trial of the cause before a jury, it appeared that the defendant's railroad extending from Columbus to Cleveland, passed through the farm of the plaintiff, on which he resided, in the county of Morrow: that on the 17th of April, 1851, a train of cars, under the management of defendant's agents, in passing upon said railroad through the plaintiff's farm, run upon the plaintiff's hogs, which had wandered off upon the railway track, and killed them. And evidence was offered on the part of the plaintiff, tending to prove, that at the time the hogs were killed, the train was passing at the usual and ordinary speed, and that from the situation of the railroad at that locality, and the relative situation and locality of the hogs, and the train of cars on the railroad, at the time of the occurence, the defendant's agents in control of the train, could easily and readily have so checked the speed of the cars, as to have permitted the plaintiff's hogs to have escaped from the railroad track without injury: but that the agents of the defendant did not check the speed of the train, but continued to run the same with unabated speed, by reason whereof the hogs were unable to escape, and were killed. And it appears, also, that evidence was offered on the part of the defendant, tending to prove that at the time of the occurrence, the agents of the defendant, did check the speed of the train, that the usual signal was given to check up, before the cars ran over the hogs—that the train was at the time running at its usual and ordinary speed.

The testimony having been closed, the plaintiff's counsel asked the court to charge the jury, that if they were satisfied from the evidence, that the defendant's agents could by the exercise of ordinary care and caution, have so checked the speed of said train of cars, as to have permitted the plaintiff's hogs to have escaped without injury: but that the defendant's agents did not at all check the speed of the train, or attempt so to do, but continued to run the same at the usual and ordinary speed, by means whereof the plain-

tiff's hogs were killed, the plaintiff would be entitled to a verdict for the value of the hogs so killed. The court, however, refused to give this in charge to the jury, but instructed the jury as follows:

1st. That the defendant had a right to have the track of its railroad free from obstructions, so that its trains might run thereon with safety, subject to be crossed only on public highways and regular private crossings, and that, therefore:

2d. If the jury found from the evidence that said hogs, of the plaintiff were killed while on the track of said railroad, and not while crossing said railroad at such public or private crossing, that said hogs were unlawfully upon said track, that said defendant was not bound to check the ordinary and usual speed of said cars; and that if said hogs were killed by defendant's train of cars, while in the ordinary way passing along said track, said plaintiff had suffered damage but not injury from the act of the defendant, and that the defendant was not liable therefor.

To the charge thus given by the court below to the jury, and the refusal to charge as requested, the plaintiff excepted, and took his bill of exceptions, setting out the facts as above stated.

Under the instructions of the court below, the jury returned a verdict for the defendant, on which judgment was rendered, to reverse which this writ of error is prosecuted.

S. J. Kirkwood and *B. Burns*, Attorneys for plaintiff in error.

Finch & Olds, and *H. B. Carrington*, Attorneys for defendant.

The opinion of the Court was delivered by

BARTLEY, J.—A maxim of the law, tested by the wisdom of centuries—exacts of every person in the enjoyment of his property, the duty of so using his own as not to injure the property of his neighbor. It is in accordance with this principle, that it has been held, that though a person do a lawful thing, yet, if any damage thereby befalls another, which he could have avoided by reasonable and proper care, he shall make reparation. Hence the general rule, that in all cases where damage accrues to another, by the negligence or improper conduct of a person in the exercise of his peculiar trade

or business, an action is maintainable. *Shields* vs. *Blackburne*, 1 H. Blacks. 158; *Moore* vs. *Mourgue*, Cowp. 480; Buller's N. P. 73; Broom's Legal Maxims, 248.

How far this doctrine is applicable to railroad companies, in the exercise of their peculiar business, is the question presented in the case before us. The court below refused to charge the jury on request, that if they found from the evidence that the defendant's agents could, in the use of ordinary care, have easily and safely avoided the destruction of the plaintiff's property by checking the speed of the train, the defendant would be liable: but on the contrary, instructed the jury, that as the hogs were improperly on the railroad, the defendant's agents were not bound to check the ordinary and usual speed of the cars, or use any means or caution to save the plaintiff's property.

The position taken by the court below, assuming the animals to have been unlawfully on the railroad, would justify not only a wanton disregard of the plaintiff's property, but even an intentional destruction of it, by defendant's agents, providing it occur while running the train on the railroad in the ordinary way, and at the usual speed.

Railroad Companies have become important and useful public agents, affording vast facilities for trade and travel, and producing extensive results upon the social condition as well as the business of the country; but while it is important that they should be fully protected in the appropriate and legitimate exercise of their powers, it is *just* that private individuals be secured from injury or invasion of their rights, by the mode or manner in which railroad companies exercise their peculiar functions. The obligation to make reparation for damages done to another, by a person, in the *improper manner* in which he exercises his own appropriate employment, often requires great nicety of discrimination; and the application of this injunction to railroad companies in their peculiar business, so widely differing from that of other persons, must frequently become a matter of no inconsiderable difficulty.

It is claimed on the part of the defence in this case;

1st. That it is the duty of the owner of domestic animals to keep

them on his own lands, or within enclosures; and that if they wander from his own lands, and get upon the unenclosed lands of his neighbors, they will be *unlawfully* there, and the owner guilty of a trespass.

2d. That the plaintiff being in fault, and guilty of an unlawful act in allowing his hogs to escape from his own lands, and get upon the railroad, he cannot maintain an action for the value of the animals killed by the defendant while in the prosecution of its lawful business, even although the agents of the company might have readily and safely avoided injury to the animals, by the exercise of ordinary care and prudence in the management of the train of cars.

The doctrine that the owner of cattle, hogs, horses, &c., is bound to keep them on his own lands, or within an enclosure, and that he becomes a wrong-doer if any of them escape or stray off upon the lands of another person, although unenclosed, is said to be derived from the common law of England, and to be in force in this State. At an early period in this State the common law of England, and the statutes of that country of a general nature in aid of the common law, passed prior to the fourth year of King James I, were adopted by legislative enactment. But this act was repealed by the General Assembly, on the 2d day of January, 1806, since which time the common law of England has had no force in this State derived from legislative adoption. But having been adopted in the original States of the union, and introduced into Ohio at an early period, the common law has continued to be recognized as the rule of decision in our courts, in the absence of legislative enactments, so far as its rules and principles appeared to be based on sound reason, and applicable to our condition and circumstances. The common law therefore, has no force in Ohio, except so far as it derives authority from judicial recognition in the practice and course of adjudication in our courts; and this extends no further than it explains and illustrates the rules of right and justice as applicable to the circumstances and institutions of the people of the State. In the case of *Sergent* vs. *Steinberger*, 2 Ohio Rep. 305, the Supreme Court of this State held that the common law, so far as it relates to the subject of the estate by joint tenancy, would not be

recognized in Ohio, upon the ground that the *jus accrescendi* was not founded in principles of natural justice, nor in any reasons of policy applicable to our state of society or institutions, but on the contrary, was adverse to the understandings, habits, and feelings of the people.

Admitting the rule of the common law of England in relation to cattle and other live stock running at large, to be such as stated, the question arises, whether it is applicable to the condition and circumstances of the people of this State, and in accordance with their habits, understandings, and necessities. If this be the law in Ohio now, it has been so since the first settlement of the State, and every person who has allowed his stock to run at large, and go upon the unenclosed grounds of others, has been a wrong-doer, and liable to an action for damages by every person on whose lands his creatures may have wandered. What has been the actual situation of affairs, and the habits, understandings, and necessities of the people of this State from its first settlement up to the present period, in this respect? Cattle, hogs, and all other kinds of live stock, not known to be breachy and unruly or dangerous, have been allowed, at all times and in all parts of the State, to run at large and graze on the range of uncultivated and unenclosed lands. And this prevails not only throughout the country, but also in the villages and cities, except where it may be to a limited extent, restrained by local municipal ordinances. For many years in the early settled parts of the State, the people were unable, and at the present time in some parts of the State, they are yet unable to clear and enclose more ground than that actually needed for cultivation. And there is not at this time perhaps enclosed pasture lands sufficient to confine the one-half of the live stock in the State. Even a statutory enactment imposing the severest criminal punishment for permitting these animals to be at large, could not be enforced without either slaughtering or driving a large portion of them from the State. It has been the habit of the people to enclose their grounds for the purpose of cultivation, and to fence against the animals running at large. And it has been only within a few years, and that only in the better improved parts of the State, that uncultivated pasture grounds have

been enclosed. And this has not been done, because the owners considered themselves required by law to confine their stock within enclosures, but for their own convenience and advantage. So that, it has been the general custom of the people of this State, since its first settlement, to allow their cattle, hogs, horses, &c., to be at large, and range upon the unenclosed lands of the neighborhood in which they are kept; and it has never been understood by them that they were *tors feasors*, and liable in damages for letting their stock thus run at large. The existence or enforcement of such a law would have greatly retarded the settlement of the country, and have been against the policy of both the General and the State government.

The common understanding upon which the people of this State have acted, since its first settlement, has been, that the owner of land was obliged to enclose it with a view to its cultivation; that without a lawful fence he could not, as a general thing, maintain an action for a trespass thereon by the cattle of his neighbor running at large; and that to leave uncultivated lands *unenclosed*, was an implied license to cattle, and other stock at large, to traverse and graze them. Not only, therefore, was this alledged rule of the common law inapplicable to the circumstances and condition of the people of this State, but inconsistent with the habits, the interests, necessities and understanding of the people.

Besides this, the Legislature of the State has put at rest all question as to the existence of any such rule in Ohio. The proviso in the first section of the statute in relation to strays, recognizes the fact of animals being allowed to run at large upon the range of unenclosed lands, in the following language:

"Provided, that no person shall be allowed to take up any neat cattle, sheep or hogs after the first day of April, and before the first day of November, annually: nor shall any compensation or fees be allowed to any person for taking up any stray animal *from the range where such animal usually runs at large; &c.*"—SWAN'S REVISED STATUTES, 883.

The statute regulating enclosures and providing against trespassing animals, (see Swan's Revised Statutes, 426,) fixes the requisites of a lawful fence; and in the seventh section, provides the remedy,

when the owner or occupant shall feel himself aggrieved by the animals of another person, which run at large, breaking into his enclosure. And the twelfth section of the same statute provides, that when the fence-viewers shall ascertain any animals to be habitually breachy and unruly, notice thereof shall be given to the owner or keeper, who shall be required thereafter, under a penalty, to restrain such animals from running at large, &c.

This legislation is wholly inconsistent with the doctrine, that it is *unlawful* for the owner of animals to allow them to run at large, and that he is liable in damages for a trespass, in case they go upon the unenclosed grounds of another. Why the provision to restrain breachy and unruly animals from running at large, if it were the law of the State that the owner should allow none of his stock to be at large, whether breachy or not? And why the provision for the assessment of damages for injury by trespassing animals, made to depend upon the contingency of a lawful fence? If the owner of trespassing animals were liable in damages, whether the lands of the injured party were enclosed or not, the provision making the assessment of damages to depend on the existence of a lawful fence, would seem to be unnecessary, if not wholly absurd.

It was adjudged by the Supreme Court of Connecticut, in the case of *Stadwell* vs. *Ritch*, 14 Conn. Rep. 293, that the rule of the English common law, making it the duty of the owner of cattle to restrain them, and subjecting him to liability in damages for suffering them to go upon the lands of another, whether enclosed or not, does not prevail in that State, being inconsistent with the situation of the country from the time of the first settlement of the State, and also repugnant to the legislative enactments of the State relating to that subject; on the contrary, it was held, that the owners of lands were obliged to enclose them by a sufficient fence, before they could maintain an action for a trespass done thereon by the cattle of another. The same doctrine was laid down by Judge Swift, (see Swift's Digest, 525,) and also recognized in the case of *Barnum* vs. *Vandusen*, 16 Conn. Rep. 200.

It has been said, that in South Carolina a sufficient enclosure was necessary to protect the planter against the inroads of horses, cattle

and hogs, whose right to go at large in the range is derived from the common law of South Carolina. *Town of Beaufort* vs. *Danner*, 1 Strobhart, 175.

It was held by the Supreme Court of the State of Illinois, in the case of *Seely* vs. *Peters*, 5 Gilman's Rep. 130, that the common law, requiring the owner of cattle, hogs, &c., to keep them on his own land, has never been in force in Illinois; that there is no general law in that State prohibiting cattle from running at large; and that in order to maintain an action for the trespass of cattle on land, the owner of the land must have it surrounded by a sufficient fence. The subject is carefully investigated in this case, and the ground on which the decision is placed is, that the common law rule is inapplicable to the circumstances and condition of the people, and also inconsistent with the legislation of that State.

It is true, that a contrary doctrine has been held in a number of the other States, but the grounds upon which it is placed do not appear to have any real practicable application to the condition of things in this State. It is said that the purpose of fences, in the view of the common law, is to keep the owner's cattle *in*, and not the cattle of others *out*. *The Tonawanda Railroad Company* vs. *Munger*, 5 Denio, 255. The reason of a law should never rest in mere abstraction, without any application to the practical affairs of society; and it is a maxim, that when the reason of a rule ceases, the law itself ceases. Fences have two sides to them, and the real and practical purpose of fences in this State has been to protect the enclosure of the proprietor from the intrusion of animals *without*, as well as to confine such as may be kept *within*.

If an action for damages be maintainable, for every instance in which the cattle and other live stock of a person goes upon the unenclosed lands of another without express license, more than nine-tenths of the business men of this State become, for this cause, *tort feasors* every day of the year, and liable to suits for damages, every day. It will not do to say, that although such right of action existed, yet that it would be restrained by the rule *De minimis non curat lex*. This would be a refinement resulting in a distinction without a difference. As there can be no wrong without a remedy,

if there could be no recovery, the right of action in reality could not exist.

This doctrine of the common law may be suitable to an old and highly cultivated country, where all the lands, except the public highways and commons, are under enclosure, but it has no *suitable* and *proper* application in Ohio.

There is no law in Ohio, therefore, requiring the owners of cattle, horses, hogs, and other live stock, to keep them on his own lands, or within an enclosure, and when he allows them to be at large on the range of unenclosed lands, he cannot be said to act *unlawfully*, or to be guilty of an *omission* of *ordinary care* in the keeping or charge of his stock. For by so doing, he does nothing more than that which has been customary, and which has been, by common consent, done generally by the people since the first settlement of the State. It is true, that extraordinary diligence, or the highest degree of care in the management of his stock, would require the owner to confine it in stables, or within sufficient enclosures. But, under ordinary circumstances, all that can be required of a person in the management of his property, is to exercise that degree of care and diligence which men of common prudence, or, in other words, which men in general exercise in taking care of their own property.

This right, however, to allow animals to run at large, has its qualifications. The owner of animals, known to be mischievous or dangerous, is bound to confine them, and if he omit this duty, he is responsible for any loss or damage which any other person may suffer thereby. And whenever the owner is notified of the fact, that any of his creatures at large have become troublesome, by means of breachy, unruly, or dangerous habits, it is his duty to take them up without delay, and confine them. And the right to allow animals, inoffensive in their habits, to be at large, does not imply a *right* in the owner to keep his animals upon another's unenclosed lands against his consent. On the contrary, the owner may drive them off as often as they come on to his lands, using no unnecessary violence; or, he may at any time exclude them permanently, by the erection of a fence, or other means of enclosure. And,

although there is no law in the State requiring any person to fence or enclose his grounds, yet the owner who leaves his lands unenclosed, takes the risk of intrusions upon his grounds from the animals of other persons running at large. And the owner of the animals, in allowing them to be at large, takes all the risk of their loss or of injury to them by *unavoidable accident*, arising from any danger into which they may wander.

Applying the views here expressed to the case under consideration, upon what ground does the plaintiff's claim to reparation in damages rest? Where there is wanton, malicious, or intentional injury done to a person, there is usually no difficulty in determining the liability of the wrong-doer. But where a party suffering loss, seeks redress upon the ground of *mere negligence*, or the *omission* of *ordinary care* on the part of another, in the conduct or manner of prosecuting his lawful business, there are often difficulties requiring close attention, and sometimes the utmost nicety of discrimination.

Admitting the plaintiff's right to allow his domestic animals to be at large, under ordinary circumstances, it is claimed, that the defendant, having appropriated its railroad track to the exclusive purpose of running its locomotives and trains, and having the undoubted right to pass over its road, unmolested, at usual railroad speed, the plaintiff's hogs had no right to be on the track, and were wrongfully there; and that the plaintiff, in allowing them to be at large in the vicinity of the railroad, where danger was apparent, was *in fault*, and that the injury, therefore, having been caused, *in part* at least, by the negligence of the plaintiff, he cannot maintain the action.

The defendant's right to the exclusive and unmolested use of its railroad track, is undeniable. And it must be conceded that the plaintiff had no *right* to have his hogs on the track, and that they were there improperly. But how came they there? If the plaintiff had placed them there, or, knowing them to be there, had omitted to drive them off, he would have been, perhaps, precluded from all claim to compensation. But it would appear, that in the

exercise of the ordinary privilege of allowing these animals to be at large, by the plaintiff, they accidentally and without his knowledge wandered upon the railroad track. The right of the defendant to the free, exclusive, and unmolested use of its railroad, is nothing more than the right of every other land proprietor, in the actual occupancy and use of his lands, and does not exempt it from the duty enjoined by law upon every person, so to use his own property as to do no unnecessary and avoidable injury to another. Finding the animals upon the track, it was the right, and, indeed, the duty of the agents of the Company to drive them off, but not to injure or destroy them by unnecessary violence. The owner of a freehold estate in lands enclosed by a lawful fence, has a right to expel trespassing animals which have broken through his enclosures, but in doing so, he would become liable in damages to the owner of the animals, if they be injured by the use of unnecessary and improper means; although the latter would be bound to make reparation for the injury done to the former by the trespassing animals. It is not pretended that the railroad of the defendant was under enclosure, through which the plaintiff's hogs had broken. It is true, there is no law in Ohio *compelling* railroad companies to fence their roads; but when they leave their roads *open* and *unfenced*, they take the risk of intrusions thereon from animals running at large, as do other land proprietors who have their lands unenclosed. If a farmer undertake to cultivate his ground in corn, without enclosing it, he would doubtless be troubled by the destructive intrusions of cattle running at large; but, without a sufficient fence, he could not maintain an action against the owner of the animals for the trespass. Had the defendant protected its railroad by a sufficient fence and cattle-guards, and the plaintiff's animals broken over the enclosure, and gone upon the railway track, the plaintiff would no doubt have been liable to the Company in damages for the trespass of the animals. The defendant constructed its railroad *with the knowledge* that it was the common custom of the country to allow domestic animals to run at large upon the unenclosed ground of the neig borhood; and without the precaution of *enclosing* its railroad, the Company could not sustain an action gainst

the owner of such animals at large as might happen to wander upon the track of the road. The owner of the animals, in allowing them to run at large, takes the risk of their loss or of injury to them by *unavoidable* accident; and the Company, in leaving its road unprotected by enclosure, runs the risk of the occasional intrusions of such animals upon its road, without any remedy against the owner.

The question in this case, however, is, what degree of care, if any, was the defendant bound to use, under the circumstances, to avoid injury to the plaintiff's property? That the plaintiff was in the exercise of the highest degree of care over his property, cannot be fairly claimed. A *very prudent* man would not allow his stock to be at large in the immediate vicinity of an unenclosed railroad, where the animals might accidentally, and without his knowledge, wander off upon the railway track. The plaintiff, therefore, being in one respect negligent or slightly in fault, it is claimed, that he cannot maintain his action, even although the defendant could have avoided injury to the animals, by the use of ordinary care and caution.

It is true, that a party in an action for negligence cannot recover damages which have resulted from his own negligence and want of care; and it has been held, that the party seeking the redress must not only show his adversary to be in the wrong, but also be prepared to prove that no negligence of his own has tended to increase or consummate the injury. But the doctrine that where *both parties are in fault*, the party sustaining the injury cannot recover, is subject to several *very material* qualifications. An effort has been made, however, to sustain its general application, upon the idea of a mutuality of obligation to observe due care and caution; and that negligence by one person absolves another from the duty of care and diligence towards him. In the case of *The Tonawanda Railroad Company* vs. *Munger*, (5 Denio, 266,) the Court said:

"Negligence is a violation of the obligation which enjoins care and caution in what we do. But this duty is relative, and where it has no existence between particular parties, there can be no such thing as negligence in the legal sense of the term. A man is under no obligations to be cautious and circumspect towards a wrong-doer."

This idea, however, that the liability in damages for negligence depends upon any mutuality of obligation, is more fanciful than real. Puffendorf places the right to reparation upon the ground of an original moral duty, in language both graphic and expressive, as will appear by the following extract:

"In the series of absolute duties, or such as oblige all men antecedently to any human institution, this seems with justice to claim the first and noblest place, *that no man hurt another; and in case of any hurt or damage done by him, he fail not to make reparation.* For this duty is not only the widest of all in its extent, comprehending *all men*, on the bare account of their *being men*, but it is at the same time the most easy of all to be performed, consisting for the most part purely in a negative abstinence from acting, except that its assistance is sometimes necessary in restraining the passions, when they fight and struggle against reason, amongst which rebellious desires, that boundless regard which we sometimes show to our own private advantage, seems to be the *principal and the ringleader.* Besides, it is the most necessary of human duties, inasmuch as a life of society cannot possibly be maintained without it. For, suppose a man to do me no good, and not so much as to transact with me in the common offices of life, yet provided he do me no harm, I can live with him in tolerable comfort and quiet."

Rutherford, in his "Institutes of Natural Law," page 201, says, that the origin of the right to reparation in damage is founded on a principle of natural law.

It would seem that the liability to make reparation for an injury, rested, not upon the consideration of any reciprocal obligation, but upon an original moral duty enjoined upon every person, *so to conduct himself, or exercise his own rights, as not to injure another.* It is conceded, that where the conduct of the party complained of has been malicious, or his *negligence so wanton and gross* as to be evidence of voluntary injury, the injured party is entitled to redress, although there has been negligence on his part. *Wynn* vs. *Allen*, 5 W. & S. 524; *Munroe* vs. *Leach*, 7 Metc. 274; *Farwell* vs. *Boston and Worcester Railroad Company*, 4 Metc. 49. But where the injury arises neither from malice, design, nor wanton and gross neglect, but simply the neglect of ordinary care and caution, and the parties are mutually in fault, the negligence of both being the *immediate* or *proximate* cause of the injury, it would seem that a recovery is fairly denied, upon the ground that the injured party must be taken to have brought the injury upon him-

self. For the parties being mutually in fault, there can be no apportionment of the damages, no rule existing to settle in such case what the one shall pay more than the other.

This rule, however, that where both parties are in fanlt, and the negligence of each a *proximate* cause of the injury, has been chiefly applied to cases of collision between vessels, carriages, &c., passing on the public thoroughfares.

The mere fact, however, that one person is in the wrong, does not, in itself, discharge another from the observance of due and proper care towards him, or the duty of so exercising his own rights as not to injure him unnecessarily. There have been numerous adjudications, both in England and in this country, where parties have been held responsible for their negligence, although the party injured was at the time of the occurrence culpable, and, in some of the cases, in the actual commission of a trespass.

In the case of the *New Haven Steamboat and Transportation Company* vs. *Vanderbilt*, 16 Conn. Rep. 421, the Supreme Court of Connecticut held it to be a principle of law, that while a party on the one hand shall not recover damages for an injury which he has brought upon himself, neither shall he, on the other hand, be permitted to shield himself from an injury which he has done, because the party injured was in the wrong, unless such wrong contributed to produce the injury; and even then, it would seem that the party setting up such defence is bound to use common and ordinary caution to be in the right. This decision was founded on the authority of *Butterfield* vs. *Forrester*, 11 East, 58, in which Lord Ellenborough said: "A party is not to cast himself upon an obstruction, which has been made by the fault of another, and avail himself of it, if he does not himself use common and ordinary caution to be in the right. In cases of persons riding upon what is considered to be the wrong side of the road, that would not authorize another purposely to ride up against them."

In the case of *Birge* vs. *Gardiner*, 19 Conn. Rep. 507, where the defendant had set up a gate on his own land, by the side of a lane, through which the plaintiff, a child between six and seven years of age, with other children in the same neighborhood, were

accustomed to pass from their places of residence to the highway; and the plaintiff, in passing along such lane, without the liberty of any one, put his hands on the gate and shook it, in consequence of which it fell on him and broke his leg—the Supreme Court of Connecticut said: "There is a class of cases, *in which defendants have been holden responsible for their misconduct, although culpable acts of trespass by the plaintiffs produced the consequences;*" and held in this case, that if the defendant was guilty of negligence, he was liable for the injury, unless the plaintiff, in doing what he did, was guilty of negligence or misbehaving, or of the want of proper care and caution; and that in determining this question, it was proper to take into consideration the age and condition of the plaintiff, &c., and that the *fact that the plaintiff was a trespasser in the act which produced the injury complained of, would not necessarily preclude him from a recovery against a party guilty of negligence.* This decision was sustained by the authority of *Lynch* vs. *Nurdin*, 1 Adolphus & Ellis, 35, (2 Stephen's Nisi Prius, 1015,) which was an action for negligence committed by the defendant's servant, in leaving his cart and horse standing for half an hour in an open street, and while there the plaintiff, with other children, got into and about the cart, and teased the horse, which moved, whereby the plaintiff was injured. Lord Denman, C. J., said: "*In the present case, the fact appears that the plaintiff has done wrong;* he had no right to enter the cart, and abstaining from doing so, he would have escaped the mischief. Certainly, he was a *co-operating cause* of his own misfortune, by doing an *unlawful act;* and the question arises, whether that *fact alone* must deprive the child of his remedy. The legal proposition, that one who has, by his own *negligence contributed* to the injury of which he complains, cannot maintain his action against another in respect of it, has received some *qualifications.* Indeed, Lord Ellenborough's doctrine, in *Butterfield* vs. *Forrester*, which has been generally adopted since, would not set up *the want* of a *superior* degree of skill or care as a bar to the claim for redress. *Ordinary care* must mean, that degree of care which may reasonably be expected from a person in the plaintiff's situation."

The same doctrine was substantially recognized in the case of *Chaplin* vs. *Hawes et al.*, 3 Carr. & Payne, 554, in which Best, C. J., remarks:

"If the plaintiff's servant had such a clear space that he might easily have got away, then I think he would have been so much to blame as to prevent the plaintiff's recovering. But, on the sudden a man may not be sufficiently self-possessed to know in what way to decide; and in such a case, I think the wrong-doer is the party who is to be answerable for the mischief, *though it might have been prevented by the other party's acting differently.*"

In the case of *Bird* vs. *Holbrook*, 15 Eng. Com. Law Rep. 91, it was held, that where the defendant, who for the protection of his property, some of which had been stolen, set a spring-gun, without notice, in a walled garden, at a distance from his house, and the plaintiff, having climbed over the wall in pursuit of a stray fowl, was shot, he (the defendant) was liable in damages, although the plaintiff brought the injury upon himself by trespassing upon the defendant's enclosure.

The case of *Vere* vs. *Lord Cawdor*, 11 East, 567, was an action of trespass for shooting and killing a dog of the plaintiff; in which it was held, that a plea in bar constituted no justification which set forth that the lord of the manor was possessed of a close, and that the defendant, as his gamekeeper, killed the dog when running after hares in that close, which was for the preservation of hares; the plea not averring that it was *necessary* to kill the dog for the preservation of the hares, &c. In this case, Lord Ellenborough, C. J., said: "The question is, whether the plaintiff's dog incurred the penalty of death for running after a hare in another's grounds? And if there be any precedent of that sort, *which outrages all reason and sense, it is of no authority to govern other cases.*"

The same doctrine was recognized in the case of *Marriott* vs. *Stanley*, 39 Eng. C. L. Rep. 559. Also in the case of *Raisin* vs. *Mitchell et al.*, 38 Eng. C. L. Rep. 252, in which a jury returned a verdict in favor of the plaintiff for £250, with *a special finding*, on inquiry, *that there were faults on both sides;* and it was held,

that notwithstanding this the plaintiff was entitled to the verdict, *as there might be faults with the plaintiff to a certain extent, and yet not to such an extent as to prevent his recovering.* The same subject was very fully considered in the case of *Deane* vs. *Clayton*, 2 Eng. C. L. Rep. 183, in which Dallas, J., remarks: "To the next class of decisions I also equally accede; namely, those which establish that you shall do no more *than the necessity of the case requires*, when the excess may be in any way injurious to another, a principle which pervades every part of the law of England, criminal as well as civil, and, indeed, belongs to all law that is founded on reason and natural equity."

It is upon this ground, that where domestic animals, even those which are *breachy* and *unruly*, break through the lawful enclosures of another, the owner of such enclosure, although he has a right of action for the trespass, and has the right to expel the trespassing animals from his grounds, and that quickly and with no very kind treatment; yet in so doing, he is not allowed to use *unnecessary* or *excessive* violence; and if he does, and the animals be *killed* or *injured* thereby, he will be liable to the owner of the animals in damages. And this is in strict accordance with the decision in the case of *Vere* vs. *Cawdor*, above mentioned. To the same effect is the case of the *Mayor of Colchester* vs. *Brooke*, 53 Eng. Com. L. R. 376, cited in 1 Smith's Leading Cases, 312, where it was held, that, although the plaintiff was chargeable with wrong and negligence in placing and keeping the deposit of a bed of oysters in the channel of a navigable stream, which created a public nuisance, yet the defendant was not justifiable in running his vessel upon the deposit and greatly injuring the oysters, when there was room to pass in the stream without it, and the injury could have been avoided by the use of reasonable care and diligence. This is only carrying out the rule, that though a man do a lawful thing, yet if any damage thereby be done to another, which he could have reasonably and properly avoided, he will be held liable. So it is said, if a man lop a tree on his own ground, and the boughs fall upon another's premises, *ipso invito*, and do an injury, an action lies. So also, where a man in building his own house, lets fall a piece of timber on his neigbor's

house and injures it. And likewise, where a party so negligently constructed a hayrick on the extremity of his land, that in consequence of its spontaneous ignition, his neighbor's house was burnt down, an action has been sustained, *Vaughan* vs. *Menlone*, 3 Bing. N. C. 468.

And where persons have the control of dangerous instruments, the law, out of regard to the safety of the community, requires them to be kept with the utmost care. So that, where a party being possessed of a loaded gun, sent a young girl after it with directions to take the priming out, which was accordingly done, but an injury was done to the child of another person, in consequence of the girl presenting the gun and drawing the trigger, when the gun went off, the party was held liable in damages to the person injured. *Dixon* vs. *Bell*, 5 M. & S. 198.

Another modification of the rule that the concurrence of the plaintiff's negligence with that of the defendant will defeat the claim to reparation, is that where the plaintiff, knowing the danger, voluntarily placed his property in an exposed and hazardous position or in more than ordinary danger from the lawful acts of the defendant. Sedgwick on Damages, 471. This principle was settled by the Supreme Court of New York in the case of *Cook* vs. *The Champlain Transportation Company*, 1 Denio, 99, in which it was held, that where a person, in the lawful use of his own property, exposes it to the danger of accidental injury from the lawful acts of others, he does not thereby lose his remedy for an injury caused by the culpable negligence of such other persons; so that the owner of land on the shore of a stream, or lake, or adjoining the track of a railroad, may lawfully build on his land, though the situation be one of exposure and hazard, and be nevertheless, entitled to protection against the *negligent acts* of persons lawfully passing the same with vessels or carriages, propelled by steam engines, by which such buildings may be set on fire, on the ground that the owner undertook the risk and hazard of injury by *mere accident*, but not the risk of injury by *negligence.*

But there is yet another element in this class of cases, which occasionally has an important bearing upon the right of redress. The

negligence of the injured party, to preclude him from a recovery, must be in part, at least an *immediate* or *proximate cause* of the injury. To this effect was the decision of the case of *Davies* vs. *Mann*, 10 Meeson & Welsby, 545.

The plaintiff having fettered the fore feet of an ass belonging to him, turned it into a public highway; and at the time in question, the ass was grazing on the off side of a road about eight yards wide, when the defendant's team of three horses, coming down a slight descent, at what the witness termed a "smartish pace," ran against the ass, knocked it down, and the wheels passing over it, it died soon after. The ass was fettered at the time, and it was proved, that the driver of the wagon was some little distance behind the horses. The learned judge, (Erskine, before whom the case was tried at the Worcester assizes) told the jury, that though the act of the plaintiff, in leaving the donkey on the highway, so fettered as to prevent his getting out of the way of carriages traveling along it, might be *illegal*, still, if the *proximate* cause of the injury, was attributable to the want of proper conduct on the part of the driver of the wagon, the action was maintainable against the defendant, and his Lordship directed them, if they thought the accident might have been avoided by the exercise of ordinary care, on the part of the driver, to find for the plaintiff.

After a verdict for the plaintiff, on a motion for a new trial, which came before the Exchequer, Lord Abinger, C. B. said:

"I am of opinion that there ought to be no rule in this case. The defendant has not denied that the ass was lawfully in the highway, and therefore, we must assume it to have been lawfully there. But even were it *otherwise*, it would have made *no difference:* for as the defendant might, by the exercise of proper care, have avoided injuring the animal, and did not, he is liable for the consequences of his negligence, though the animal *may have been improperly there.*"

The Supreme Court of Vermont, in the case of *Trow* vs. *The Vermont Central Railroad Company*, 24 Vermont Rep. 488, in which this doctrine is discussed and fully sustained, said; "When the negligence of the defendant is *proximate*, and that of the plain-

tiff *remote*, the action can then well be sustained, although the plaintiff is not entirely without fault. This seems to be settled now in England and in this country. Therefore, if there be negligence on the part of the plaintiff, yet if, at the time when the injury was committed, it might have been avoided by the defendant, in the exercise of reasonable care and prudence, an action will lie for the injury. So in this case, the plaintiff was guilty of negligence or even of positive wrong, in placing his horse in the highway, the defendant was *bound to exercise the reasonable care and diligence* in the use of its road, and management of the engine and train, and if for want of that care, the injury arose, the defendant is liable."

From a review of the decisions on this subject both in England and in this country, the following conclusions appear fairly deducible:

That the general rule is, that where the parties are mutually in fault, or in other words where negligence of the *same nature* in each party has co-operated to produce the injury, the party sustaining the loss, is without remedy: but that this rule is subject to the following qualifications:

1st. The injured party, although in fault to some extent at the time, may, notwithstanding this, be entitled to reparation in damages for an injury arising from the negligence of another, which could not have been avoided by the exercise of ordinary and reasonable care on the part of the injured party.

2d. Where the negligence of the defendant is the *proximate* cause of an injury, but that of the plaintiff only *remote*, consisting of some act or omisson not occurring at the time of the injury, the action for reparation is maintainable.

3d. When a party has in his custody or control dangerous instruments, or means of injury, and negligently uses them, or places them in a situation unsafe to others, and another person although in the commission of a trespass, or otherwise somewhat in the wrong at the time, sustains an injury thereby, he will be entitled to redress.

4th. And where the plaintiff, in the *ordinary exercise of his own rights*, allows his property to be in an exposed and hazardous position, and it becomes injured by the neglect of ordinary care and cau-

tion on the part of the defendant, he is entitled to reparation, for the reason, that, although by allowing his property to be exposed to danger, he took upon himself the risk of loss or injury by *mere accident*, he did not thereby *discharge* the defendant from the duty of observing *ordinary care* and *prudence*, or in other words voluntarily incur the risk of injury by the *negligence* of another.

The application of these rules, which appear *reasonable* and *just* removes all difficulty in the disposition of the case before us. The act of the plaintiff, allowing his hogs to be at large in the neighborhood of the railroad, where they were exposed to the danger of getting upon the railway track and being injured, if it could be said to be tributary to the injury at all, was only a *remote cause* of the injury, and in the voluntary exposure of his property to danger, in the exercise of his lawful rights, he took upon himself the risk of injury to his property by *mere accident*, but not the risk of injury by the defendants' *negligence*. And the defendant was chargeable with some degree of negligence, at least by the omission to have its railroad enclosed by suitable fences and cattle guards. On this subject, the Supreme Court of Vermont, in the case of *Trow* vs. *The Vermont Central R. R. Co.* before mentioned, say: "The duty of maintaining fences and erecting cattle guards for such purposes, is imposed on the corporation not only as a matter of safety in the use of their roads and running their engines thereon, but also, as a matter of security to the property of those living near and contiguous to the road. And this arises from the consideration that they must know and reasonably expect that without such precautions, such injuries will naturally and frequently arise. And when for the distance mentioned in this case, no precautions of that kind were used upon this road, and in a place so public and common, we think as a matter of law, there was that neglect which will render the corporation liable for injuries arising solely from that cause."

This is in accordance with the decision of the same court, in the case of *Quimby* vs. *The Vermont Central Railroad Co.* 23 Vermont R. 388, in which it was held, that although the charter of the Company made no provision in reference to the obligation to maintain fences upon the line of the road, the general law of the state, in

reference to the obligation of adjoining land owners to maintain the division fences between them, did not apply, but that the obligation to maintain the fences rested primarily upon the company, and until they have either built the fences, or paid the land owner for doing it, a sufficient length of time, to enable him to do it, the *mere fact*, that cattle get upon the road from the land adjoining, is no ground for imputing negligence to the owners of the cattle." So also, the case of "The matter of the Rensselaer and Saratoga Railroad Company, 4 Paige, 553.

It being the right of the owners of animals in Ohio, to let them be at large, it follows, that the *mere fact* of allowing them to be at large generally, cannot be a ground of imputing negligence to the owner. But where the owner allows them to be at large in the immediate vicinity of an unenclosed railroad, where they will be liable to wander upon the railroad, he cannot be said to exercise that *high* degree of care and prudence in reference to his own interests, which men of *more* than ordinary care and caution, take of their own property. And admitting the plaintiff in this case, to have been chargeable in some slight degree with negligence, in this respect, yet the defendant was certainly chargeable in at least an equal degree of neglect for want of proper care in enclosing its railroad with fences and cattle guards. The construction of the railroad could not abridge or take away the existing right of the people of the State to allow their animals to be at large, although the danger which it created may have enjoined more care and prudence on the owners of animals with regard to their own interests in letting them be at large in the immediate neighborhood of the railroad. But the Company having constructed its road through a country, where it was well known that domestic animals were suffered to run at large, and where the custom and right in this respect, must be unquestionable, the consideration of the inevitable exposure of the road while unenclosed, to such casualties and injuries, as that of animals running at large, getting upon it, enjoined upon the Company the exercise of at least some degree of care and caution, the duty of enclosing its road. And by the omission of this, the defendant was *at least* as much in fault, and at least as much chargeable with negligence,

as the plaintiff. And in each case, that is, in allowing the animals to be at large by the plaintiff, and in having the railroad unenclosed by the defendant, the *negligence* was *remote*, each only *remotely* or *consequentially* contributing to cause the injury If there had existed no other negligence than this on either side, and the loss had occurred from unavoidable accident in running the train upon the hogs, when the agents of the Company were in the full exercise of due care and caution, in the discharge of their duty, the plaintiff would probably have been without redress. The turning point of this cause therefore, as presented, would seem to be, not whether there was negligence on the part of the plaintiff in allowing his hogs to be at large, or negligence on the part of the defendant in omitting to enclose its road by fences and cattle guards, but whether the agents of the defendant, at the time of the occurrence, *exercised reasonable and ordinary care to avoid the injury.* Having left its road unenclosed, and exposed to the intrusion of animals at large coming upon the track, it was the duty of the company, acting through its agents, to use ordinary and reasonable care and diligence to avoid all unnecessary injury to the animals found accidentally in the way of its train upon the road. What amounts to ordinary care on the part of the agents of the company, depends on the peculiar nature of the employment, and the circumstances attending the transaction. The defendant's agents were engaged in the management of powerful and dangerous machinery moving with great rapidity, to the skillful and safe conduct of which, is entrusted not merely property, but the safety of human beings, to a large extent. The first and paramount object of the attention of the agents of the company, is a proper regard for the safety of the persons and property in their charge on the train. The plaintiff had no right to expect his property, under the circumstances, to be protected unless it could be done consistently with the higher obligations and responsibilities resting on the agents of the defendants. In this particular employment a higher degree of skill and diligence is exacted of the persons engaged, than that which is requisite in the ordinary pursuits of life. For the protection of the persons and property of individuals in charge of the

agents of the defendant, on the train of cars, the company was held to a high degree of care and diligence; and with a due regard to this paramount duty, they were bound to the exercise of what, in that peculiar employment, would be ordinary and reasonable care to avoid doing any unnecessary injury to the property of the plaintiff which happened accidentally to be upon the railway track.

The Court of Common Pleas, however, in this case, refused upon request, to charge the jury, that the agents of the defendant were held to the exercise of *ordinary care and caution* to avoid injury to the plaintiff's property thus upon the railroad; but on the contrary, charged that the hogs, being unlawfully on the road, the defendant's agents were not required to check the speed of the train and avoid injury to the animals, even if they could easily and readily have done so.

This ruling of the Court of Common Pleas is in direct conflict with the doctrine of Lord Ellenborough, in the case of *Vere* vs. *Cowdor*, in which he said, "that the idea, that the plaintiff's dog had incurred the penalty of death, by running after a hare on another's grounds, *outrages all reason and sense;*" in conflict with the doctrine, that even in case of a trespass, no *unnecessary and excessive* violence shall be used to the injury of another, a principle, which Dallas, J. said, "*pervades every part of the law of England, criminal as well as civil; and indeed belongs to all law that is founded on reason and natural equity;* contrary to the humane spirit of our law against cruelty to animals; contrary to the doctrine, that a man in the exercise of his lawful rights, shall use reasonable and ordinary care to avoid injury to another; and contrary to the whole course of adjudication in England and in this country generally, on *mere questions* of negligence.

But it is due to the court below, to say, that its charge to the jury, was in strict accordance with the decisions in New York, Pennsylvania, and perhaps those of several other states, in cases of suits against railroad companies upon grounds similar to that, for which this suit was brought. But the decisions in those states all rest upon the ground, that it is *unlawful* for the owners of domestic animals to allow them to be at large; and that when they

are at large, and happen to stray upon a railroad, the person in charge of trains on it, are absolved from the duty of using care to avoid unnecessary injury to them. It has been shown that this doctrine has no application in this state; those decisions, therefore, are of no authority here. We recognize the maxim, *Sic utere tuo ut alienum non lædas*, as a principle, founded in justice, and essential to the peace, order, and well being of the community; as applicable to the enjoyment of all property, and the exercise of all rights incident thereto, to the protection of which the *weakest* are entitled, and from the observance of which, the most *powerful* are not exempt.

For the error in the charge of the court below to the jury, the judgment is reversed, and the cause remanded for further proceedings.

In New Jersey Chancery, October Term, 1854.

JOHN D. GLOVER AND OTHERS *vs.* ALEXANDER A. POWELL AND OTHERS.

Bill for Injunction.

1. In 1760, the Legislature of New Jersey authorized certain owners of meadow lands along Little Timber Creek to dam the said creek. Such act is constitutional, and vests an interest; it is more than a mere license, and cannot be revoked by the State.
2. The Legislature must be the sole judge and arbiter in determining what streams shall be navigable, and when they may be obstructed and their navigation destroyed for public necessity or convenience.
3. An individual cannot question the legislation of the State as to the rights of navigation, unless he can call to his aid the paramount authority of the general government.
4. What constitutes a navigable stream.
5. In 1854, the Legislature passed an act for the removal of the dam erected and continued under the act of 1760; the act of 1854 violates the Constitution of the State, and an injunction will be granted by this Court to restrain any action under it.
6. A forfeiture cannot be declared by the Legislature, it can only be done by the Courts in due process of law.